Supreme Court, U.S.
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No. 08-1345

In the Supreme Court of the United States

MICHELLE BAZZETTA, et al,
Petitioners,

v

PATRICIA L. CARUSO, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,
Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff in a 42 U.S.C. § 1983 action who has lost on all claims as a result of a unanimous merits decision in this Court can be deemed a "prevailing party" under 42 U.S.C. § 1988(b) in order to retain disputed interim attorney fees awarded during the pendency of the litigation.[1]

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[1] Respondents object to the questions presented in Petitioners' Conditional Cross-Petition because Petitioners ultimately lost on every claim in their case, when this Court unanimously reversed the lower court decisions in their entirety, *Overton v. Bazzetta,* 539 U.S. 126 (2003), and thus Petitioners' two questions are based on a faulty premise. Sup. Ct. R. 15.2.

PARTIES TO THE PROCEEDING

Petitioners include eleven class representatives on behalf of themselves and all others similarly situated, including all inmates incarcerated by Michigan Department of Corrections (MDOC) and non-incarcerated potential visitors of MDOC inmates. The eleven representative plaintiffs are Michelle Bazzetta, Stacey Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Arturo Bunton, through his next friend, Valerie Bunton.

Respondents are the Michigan Department of Corrections (MDOC) and the Director of the MDOC. Respondent Patricia L. Caruso is the current Director; under Sup. Ct. R. 35.3 she is automatically substituted as a party in place of the former Director, Kenneth McGinnis.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING PETITIONER BAZZETTAS' CONDITIONAL CROSS-PETITION 4

I. The litigation did not achieve success and the complaint was dismissed with prejudice. 4

A. Petitioners did not prevail on visitation with minor siblings. 5

B. The visitation ban for substance abuse misconducts continues to be enforced by MDOC today. 7

C. Petitioners did not establish a fundamental constitutional right of association in this case 10

D. Petitioners' statement concerning MDOC's policy about minor children visiting incarcerated felons is inaccurate. 12

II. The Petitioners are not prevailing parties as a matter of law. 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Bazzetta v. McGinnis,
(unpublished opinion 6th Cir. Nos. 06-2643/2644, August 28, 2008) 3

Bazzetta v. McGinnis,
(unpublished order, E.D. Mich. No. 95-73540, November 20, 2006) 2

Bazzetta v. McGinnis,
148 F. Supp. 2d 813 (E.D. Mich. 2001) 1

Bazzetta v. McGinnis,
286 F. 3d 311 (6th Cir., 2002) 1

Bazzetta v. McGinnis,
423 F. 3d 557 (6th Cir. 2005) 2

Bazzetta v. McGinnis,
430 F. 3d 795 (6th Cir. 2005) 2, 8, 16

Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,
532 U.S. 598 (2001) 5, 6, 15

Garcia v. Yonkers School District,
561 F.3d 97 (9th Cir. 2009) 7

Overton v. Bazzetta,
539 U.S. 126 (2003) ..... passim

Sole v. Wyner,
551 U.S. 74 (2007) 14

Statutes

42 U.S.C. § 1983 i
42 U.S.C. § 1988 ..... passim
Mich. Comp. Laws Ann. 791.268a 5, 15

Other Authorities

Public Act 8 of 2001 ..... 6, 15

Rules

Mich. Admin. Code 791.6609 ..... 5, 13
Sup. Ct. R. 15.2 i
Sup. Ct. R. 35.3 ii

STATEMENT OF THE CASE

This is a fourteen-year-old controversy brought by incarcerated felons and their visitors (Petitioners) against Michigan prison officials (Respondents) challenging prison visitation restrictions. The Petitioners initially achieved some injunctive relief from the District Court and the Court of Appeals,[2] but ultimately lost on every claim. In *Overton v. Bazzetta*, this Court unanimously reversed the Court of Appeals and held that the challenged prison visitation restrictions did not violate the First, Eighth, or Fourteenth Amendments to the United States Constitution.[3]

After further proceedings in the District Court and the Court of Appeals, a judgment dismissing the case with prejudice was entered on November 20, 2006. In response to this Court's unanimous decision on August 28, 2003, the Court of Appeals vacated its decision affirming the District Court's April 19, 2001 findings of fact and conclusions of law, *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001), and remanded the case to the District Court for further consideration in light of this Court's opinion. Pet. App. 59a-60a. Despite this Court's unanimous decision in *Overton*, the District Court issued an opinion and order on December 23, 2003 agreeing with the Petitioners' claim that MDOC's visitation restriction for inmates found guilty of substance abuse misconduct violated the procedural Due Process Clause of the Fourteenth Amendment, and held that Petitioners' claim was still

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[2] *Bazzetta v. McGinnis*, 286 F. 3d 311 (6th Cir. 2002).

[3] *Overton v. Bazzetta*, 539 U.S. 126 (2003). Rather than repeat the lengthy and complex procedural history in this case, Respondents rely on the factual and procedural background set forth in *Overton, supra*.

valid. Pet. App. 102a-118a. The Respondents appealed and the Court of Appeals reversed *Bazzetta v. McGinnis*, 423 F.3d 557 (6th Cir. 2005). On November 28, 2005, the Court of Appeals issued an amended opinion, *Bazzetta v. McGinnis*, 430 F.3d 795 (6th Cir. 2005), clarifying that *Overton* foreclosed the Petitioners' procedural due process claim. The Petitioners' petition for writ of certiorari was denied by this Court on October 10, 2006. Pet. App. 137a.

After this Court denied certiorari, on October 31, 2006, the Respondents filed in the District Court a motion for entry of judgment on the basis that all of the claims at issue in the Petitioners' third amended complaint had been decided in favor of the Respondents. On November 20, 2006, the District Court granted the Respondents' motion for entry of judgment, and on that same day the District Court issued a judgment dismissing the case with prejudice. Pet. App. 151a. The Petitioners did not appeal the dismissal of their case with prejudice. Thus, the end result is that the Petitioners lost on the merits of every claim.

During the pendency of the litigation—after the Court of Appeals opinion in 2002 but before this Court ultimately granted certiorari and unanimously reversed in 2003—the District Court, over the Respondents' objection, granted interim attorney fees to the Petitioners' counsel and ordered immediate payment. Subsequently, after the merits of all claims had been finally resolved against the Petitioners, the District Court denied the Respondents' request to vacate the award of interim fees that had already been paid.[4] On appeal, the Court of Appeals declined to determine

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[4] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, November 20, 2006; Pet. App. 10a-14a).

whether the Petitioners were a prevailing party under 42 U.S.C. § 1988(b), but nevertheless affirmed the District Court decision declining to order a return of the attorney fees. [5]

In No. 08-1213, the Respondents filed a petition seeking review of the question whether the Petitioners are entitled to retain attorneys fees when they are not prevailing parties under 42 U.S.C. § 1988(b). The Petitioners did not file a brief in opposition to that petition. Instead they filed the present cross-petition, No. 08-1345, asserting, in essence, that despite the ultimate dismissal of their complaint in its entirety, they nevertheless achieved some success during the lengthy litigation so they are entitled to retain the interim attorney fees awarded during the course of the litigation.

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[5] *Bazzetta v. McGinnis*, (unpublished opinion 6th Cir. Nos. 06-2643/2644, August 28, 2008; Pet. App. 1a-9a.).

REASONS FOR DENYING PETITIONER BAZZETTAS' CONDITIONAL CROSS-PETITION

In their Conditional Cross-Petition, Petitioners claim that they prevailed on four issues that were before this Court in *Overton, supra.* As set forth below, based on this Court's unanimous reversal of the lower court decisions in their entirety, Petitioners are not prevailing parties and, thus, they are not entitled to any attorney fees. 42 U.S.C. § 1988(b).

I. The litigation did not achieve success and the complaint was dismissed with prejudice.

Despite the fact that in the ultimate disposition of the case their complaint was dismissed in its entirety, the Petitioners point to four "rulings" that they assert were not overturned on appeal, which allow them to be considered prevailing parties in this case, and thus, entitled to retain disputed attorney fees pursuant to 42 U.S.C. § 1988(b). The Petitioners' assertions, however, ignore important facts and are based on inaccurate statements of the record and court rulings.[6] Nothing in the record of this case supports their contention that they are prevailing parties. They are not entitled to retain the disputed interim attorney fees.

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[6] After this Court's unanimous reversal on the merits, *Overton, supra*, on July 9, 2003, Petitioners filed a Petition for Rehearing wherein they asked this Court to revisit these same issues, with the exception of the permanent ban for substance abuse misconducts. Opp. App. pp 1b-10b. This Court denied the Petition for Rehearing on August 23, 2003. Opp. App. p 11b.

A. Petitioners did not prevail on visitation with minor siblings.

The Petitioners' principal contention is that because of their actions, MDOC must "allow visitation between people in prison and their minor siblings." Conditional Cross-Petition, p 11. In 1995, when this litigation began, minor siblings (under 18 years of age) were not included in the list of permissible visitors. That changed in 2001, not as a result of the litigation, but by the action of the Michigan Legislature in passing Mich. Comp. Law 791.268a, which permits the MDOC to add minor siblings to a prisoner's approved visitor list. That was the situation in 2003 as this Court recognized in *Overton v. Bazzetta*, 539 U.S. at 129: "Minors under the age of 18 may not be placed on the list unless they are the children, stepchildren, grandchildren, or siblings of the inmate. Mich. Admin. Code 791.6609(2)(b); Mich. Comp. Laws Ann. 791.268a (West Supp. 2003)." This change in the law was a voluntary act by the Michigan Legislature and does not make the Petitioners prevailing parties.[7]

Petitioners argue that they should be given prevailing party status because this change in legislation occurred after the ruling of the District Court. Thus, Petitioners are attempting to revive the "catalyst theory" as a method of recovery of attorney fees with regard to minor siblings visitation. Cross-Petition, p 11. But this Court held in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, that regardless of when the voluntary change occurs, Petitioners cannot recover attorney fees based on "a

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[7] See *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 610 (2001).

defendant's voluntary change in conduct."[8] In *Buckhannon,* this Court held that a voluntary change in conduct is insufficient to establish prevailing party status:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees without a corresponding alteration in the legal relationship of the parties.[9]

Thus, in *Buckhannon*, this Court ruled that there must be an alteration of the legal relationship of the parties—i.e. that unless a party obtains a judgment on the merits or a court-ordered consent decree, they are not a prevailing party.[10]

Here, the Petitioners claim credit for having prevailed with regard to the issue of whether minor siblings have a constitutionally protected right to prison visitation. However, the Michigan Legislature voluntarily amended the prison visitation rules to allow minor siblings of an inmate to participate in prison visitation. Public Act 8 of 2001, Mich. Comp. Laws 791.268a. There is no dispute in this case that the Michigan Legislature voluntarily chose to amend the prison visitation rules to allow minor siblings to visit. Regardless of when this change occurred, Petitioners

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[8] *Buckhannon Board,* 532 U.S. at 605.

[9] *Buckhannon Board,* 532 U.S. at 605.

[10] *Buckhannon Board,* 532 U.S. at 600.

cannot establish that the amendment was the result of an alteration in the legal relationship of the parties."[11] Petitioners cannot point to any "court-ordered consent decree" and it was Respondents who obtained a judgment on the merits on November 20, 2006. Pet. App. 151a. Thus, because there was no corresponding alteration in the legal relationship of the parties with respect to minor sibling prison visitation, the Petitioners were not the prevailing parties on this issue.[12]

B. The visitation ban for substance abuse misconducts continues to be enforced by MDOC today.

The Petitioners next claim that they prevailed with respect to the permanent ban for substance abuse misconducts. Petitioners attempt to support this claim by pointing out that during certain points in this fourteen-year-long litigation, Respondents were under the District Court's temporary injunctive order, that prohibited them from enforcing the ban. Conditional Cross-Petition, p 16. However, the significant point here is that this Court affirmed the Respondents' right to impose a ban on visitation for substance abuse misconducts in *Overton*, 539 U.S. at 130, 135:

> The Department's revised policy also sought to control the widespread use of drugs and alcohol among prisoners. Prisoners who commit multiple substance-

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[11] *Buckhannon Board*, 532 U.S. at 610.

[12] *See, Garcia v. Yonkers School District*, 561 F.3d 97, 108 (9th Cir. 2009). "Accordingly, the School District's voluntary change in behavior cannot serve as the basis for conferring prevailing party status to the Students for purposes of granting attorney fees."

> abuse violations are not permitted to receive any visitors except attorneys and members of the clergy. Rule 791.6609(11)(d).
>
> Drug smuggling and drug use in prison are intractable problems. See, *e.g.*, *Bell*, *supra*, at 559; *Block*, *supra*, at 586—587; *Hudson v. Palmer*, 468 U.S. 517, 527 (1984). Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.

In spite of this Court's decision, Respondents were required to litigate the procedural due process issue again on remand. The Petitioners' claim that this Court did not address the due process issue when it granted certiorari is wrong. Conditional Cross-Petition, p 15.[13] The due process issue was also the subject of an appeal to the Sixth Circuit Court of Appeals. After briefing and argument, the Court of Appeals determined that this Court previously ruled that the substance abuse visitation restriction did not implicate a liberty interest under the Due Process Clause. Consequently, Petitioners lost on their claim that this Court did not address "any of the due process rulings" of the lower courts.[14] Conditional Cross-Petition, p 15. In addition, in spite of Petitioners' attempt to limit *Overton, supra,* by asserting that the District Court's injunction against

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[13] *Overton*, 539 U.S. at 131-132.

[14] *Bazzetta v. McGinnis*, 430 F.3d 795, 805 (6th Cir. 2005), cert. den. 549 U.S. 952 (2006); Pet. App. 137a.

a permanent ban was not before this Court, Conditional Cross-Petition, p 17, this Court specifically upheld MDOC's right to enforce the visitation ban for substance abuse misconducts regardless of the fact that it *may* be a permanent ban:

> An inmate subject to this restriction may apply for reinstatement of visitation privileges after two years. Rule 791.6609(12). Reinstatement is within the warden's discretion.
>
> * * *
>
> Finally, the restriction on visitation for inmates with two substance-abuse violations, a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons.[15]

Petitioners attempt to support their claim that they prevailed as to visitation ban for substance abuse misconducts by using a limited quote from this Court and misstating this Court's holding in *Overton*. Conditional Cross-Petition, p 17. However, a review of the full paragraph from this Court's *Overton* decision established Respondents' right to enforce the visitation restriction as written:

> The restriction undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances

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[15] *Overton*, 539 U.S. at 131-132.

> of this case, fall below the standards mandated by the Eighth Amendment."[16]

Thus, a fair reading of this Court's decision in *Overton* establishes that Petitioners did not prevail on their claim that "all permanent bans" were lifted and that the visitation restriction "is dead." Conditional Cross-Petition, p 17.

Finally, whether MDOC modifies the visitation ban for substance abuse misconducts in the future is irrelevant. The relevant issue before this Court was whether MDOC had the right to impose this ban under the First, Eighth and/or Fourteenth Amendments. As set forth above, this Court upheld MDOC's right to impose their visitation restriction for substance abuse misconducts as it was written. *Overton,* 539 U.S. at 131-132. Thus, the Petitioners did not prevail on their claim that Respondents' substance abuse visitation restrictions violated the Due Process Clause.

C. Petitioners did not establish a fundamental constitutional right of association in this case.

The Petitioners' third claim, Conditional Cross-Petition, p 18, that they are prevailing parties because they "established a fundamental constitutional right of association which survives incarceration," is not supported by the decision in *Overton,* because Respondents did not argue that MDOC's "discretion to eliminate visits is boundless and unreviewable." Conditional Cross-Petition, p 20. This case did not establish such a right; to the contrary, this Court

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[16] *Overton,* 539 U.S. at 136-137.

expressly disavowed reaching that issue, *Overton*, 539 U.S. at 131-132 (citations omitted, emphasis added):

> We have said that the Constitution protects 'certain kinds of highly personal relationships.' And outside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents.
>
> *This is not an appropriate case for further elaboration of those matters.* The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. And, as our cases have established, freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context.
>
> We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. *We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests.*

> This suffices to sustain the regulation in question.

The Petitioners' claim that they somehow prevailed on this issue is plainly wrong.

D. Petitioners' statement concerning MDOC's policy about minor children visiting incarcerated felons is inaccurate.

In their final claim of success, the Petitioners take the position that they prevailed on the issue of who can accompany a minor child to visit his or her incarcerated parent. The Petitioners' Conditional Cross-Petition asserts, at p 22, that prior to this lawsuit "a child's biological father, if not married to the incarcerated mother, was not able to bring the child to visit his or her mother." That assertion misstates the visitation guidelines and how they were implemented by Respondents, and it fails to acknowledge that Respondents continue to require that a minor child visiting an incarcerated parent must be accompanied by a family member or legal guardian of the child. Whether a biological father can accompany a child for prison visitation turns on whether that father has acknowledged paternity of that child, not whether the father is married to the mother of the child. That was the rule when this case was argued to this Court on March 26, 2003, and it is still a requirement that must

be met today.[17] The Petitioners' assertion also fails to recognize that this Court upheld Respondents' requirement, *Overton*, 539 U.S. at 133:

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[17] At p 21 n 7 of the Conditional Cross-Petition, the Petitioners cite to the oral argument transcript of *Overton v. Bazzetta*, No. 02-94, but they mischaracterize the argument there. The rule at the time, Mich. Admin. Code 791.6609(5), provided: "a child who is under the age of 18 may visit a prisoner only if the child is on the prisoner's approved visitors list and is accompanied by an adult immediate family member or a legal guardian . . . ." During the oral argument a question was asked about an unwed father bringing a prisoner's child for a visit. Counsel for the Respondents emphasized that it is the legal relationship that matters, not the marital status, Docket No. 02-94, Transcript of Oral Argument, March 26, 2003, pp 16, 56:

> [T]he Department is permitted to insist on enough evidence to demonstrate the legal relationship.
>
> * * *
>
> QUESTION: But from respondents' argument, I had the impression that you could not have a visit from such a child, period, unless you went through some formal adoption procedure. Which is it?
>
> MR. CASEY: The--a child of a prisoner is entitled to visit if they're brought by a member of the immediate family or a legal guardian.
>
> QUESTION: Whether they're married or not married."
>
> MR. CASEY: That's correct.

> As for regulations requiring children to be accompanied by a family member or legal guardian, it is reasonable to ensure that the visiting child is accompanied and supervised by those adults charged with protecting the child's best interests.

Consequently, there is no factual or legal basis to support Petitioners' claim that they prevailed as to who can accompany a minor child visiting an incarcerated parent.

II. The Petitioners are not prevailing parties as a matter of law.

In their petition No.08-1213, the Respondents have presented legal arguments explaining why Petitioners, whose complaint was ultimately dismissed in its entirety with prejudice, are not prevailing parties within the meaning of 42 U.S.C. § 1988(b). In the present Conditional Cross-Petition, the Petitioners make no attempt to rebut those arguments. In addition to the numerous misstatements involving the factual findings and procedural history of this case as set forth above, the Petitioners also fail to acknowledge the relevant law concerning prevailing party status under 42 U.S.C. § 1988(b). They do not even attempt to distinguish *Sole v. Wyner*,[18] or offer any reason why its holding should not control here:

> We decide only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under §1988(b) if the merits of the case are ultimately decided against her.

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[18] *Sole v. Wyner*, 551 U.S. 74 (2007).

As set forth more fully in the Respondents' Petition for Writ of Certiorari, No. 08-1213, the Petitioners secured a preliminary injunction, but lost on the merits when the November 20, 2006 Judgment was entered against them. No. 08-1213, Pet. App. 151a. The Petitioners lost unanimously in this Court and lost on all claims at issue in this case on the merits. They are not prevailing parties under 42 U.S.C. § 1988(b), and thus they are not entitled to any attorney fees and costs.

The Petitioners also fail to discuss this Court's decision in *Buckhannon*,[19] which abolished the "catalyst theory" as a method of recovery of attorney fees. In their Conditional Cross-Petition, the Petitioners claim credit for having prevailed with regard to the issue of whether minor siblings have a constitutionally protected right to prison visitation. However, as explained above, the Michigan Legislature voluntarily amended the prison visitation rules to allow minor siblings of an inmate to participate in prison visitation. Public Act 8 of 2001, MCL 791.268a. Based on *Buckhannon*, the Petitioners are not prevailing parties with regard to sibling visitation.

The record is clear. This Court unanimously reversed the Court of Appeals and held that the challenged 1995 visitation restrictions did not violate the First, Eighth, or Fourteenth Amendments to the United States Constitution.[20] When the Petitioners attempted to argue that a procedural due process claim was still viable after *Overton*, the Court of Appeals determined that *Overton* foreclosed their procedural due process

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[19] *Buckhannon Board*, 532 U.S. at 600.

[20] *Overton, supra.*

claim.[21] Finally, eleven years after it began, on November 20, 2006, the District Court issued a judgment dismissing the case with prejudice.

Thus, in spite of the fact that Michigan's 1995 prison visitation restrictions have been determined to be constitutional by the highest Court in our country, counsel for the Petitioners continues to hold money that rightfully belongs to the taxpayers of the State of Michigan. Therefore, the Respondents request that this Court deny the Conditional Cross-Petition in No. 08-1345 and grant the Petition for Writ of Certiorari in No. 08-1213.

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[21] *Bazzetta v. McGinnis*, 430 F. 3d 795 (6th Cir. 2005).

CONCLUSION

The Respondents respectfully request that this Court enter an order denying the Conditional Cross-Petition for Writ of Certiorari in No. 08-1345 and granting the Petition for Writ of Certiorari in No. 08-1213.

Respectfully submitted

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Dated: July, 2009

APPENDIX

TABLE OF CONTENTS

Page

I. Petition for Rehearing
Dated July 9, 2003
Overton, et al v. Bazzetta, et al
Case No. 02-94.....1b

II. Order of U.S. Supreme Court
Decided August 25, 2003
Overton, et al v. Bazzetta, et al
Case No. 02-94.....11b

No 02-94

In the
Supreme Court of the United States
October Term, 2002

WILLIAM OVERTON, Director of
Michigan Department of Corrections;
MICHIGAN DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

MICHELLE BAZZETTA, et al.,

Respondents.

PETITION FOR REHEARING

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NOW COME Plaintiffs and, pursuant to the Supreme Court Rule 44, petition this Honorable Court for rehearing of its decision issued on June 16, 2003 or, in the alternative, for an order clarifying the judgment.

This Court's decision concludes, without qualification or exception, that the Court of Appeals decision is reversed. However, the reasoning of the majority opinion rests on several assumptions with regard to the implementation of the challenged rules that differ from the findings made by the District Court and relied upon by the Court of Appeals in its affirmation. This Court language, reversing the Court of Appeals judgment in its entirety, might be used to argue that the challenged rules can now be applied as originally written or interpreted by Defendants, even though that would conflict with this Court's assumptions underlying its opinion. Therefore, Respondents ask this Court to grant rehearing or, in the alternative, clarify its judgment, by stating that the Court of Appeals judgment is reversed to the extent it is inconsistent with this Court decision and remanded for actions consistent with this Court's decision.

1. **Visitation by Minor Siblings.**

The first area of potential conflict concerns visitation by prisoners' siblings under the age of 18. The challenged rule prohibited visits by any minor under age 18 who was not the prisoner's child, step-child or grandchild. Thus siblings were excluded. After the District Court ruled, the Michigan legislature enacted MCL 791 .268a which states that prisoners "may be permitted" to receive visits from minor siblings. Although petitioners thereafter chose

to amend their rule to allow sibling visits, the statutory change does not require this result. In fact, Petitioners' position throughout has been that corrections officials retain absolute authority to decide who can visit prisoners "as a matter of administrative grace." (Supreme Court oral argument transcript, at 7-8) *See also* Court of Appeals decision, 286 F.3d. 311, 318 note I (6th Cir., 2002) ("As Michigan did not make this change until after the district court handed down its opinion, however, and because it still defends its right to impose this or any other restriction on visits, we address the regulation here.")

In its decision, this Court relied on the revised regulation and assumed that sibling visits are permitted. (Slip op. at 2) It repeated this assumption when it upheld the exclusion of minor nieces and nephews, expressly finding the categories of permitted visitors to be reasonable because: "Visits are allowed between an inmate and those children closest to him or her—children, grandchildren, and siblings." (*Id.* at 6, emph. added)

The District Court was faced with a rule that prohibited visits by minor siblings. It found that rule violated the First and Fourteenth Amendments. 148 F. Supp. 2d 813, 849 (E.D. Mich., 2001). The Court of Appeals affirmed this ruling. 286 F. 3d 311, 319 (6th Cir., 2002). Reversal of the Court of Appeals judgment, without exception, may be used to argue that prohibition of minor siblings' visits would now be constitutionally permissible, despite the fact that the District Court opinion is not vacated by Defendants' subsequent change of the rules, *U.S. Bank Corp. v. Bonnet*, 513 U.S. 18, 25-26 (1994); *City of Mesquite v. Aladdin Castle, Inc.*, 455 U.S. 283, 289 (1982).

2. Right of Intimate Association

Petitioners argued throughout that prisoners do not retain any right of association protected by the First or Fourteenth Amendments. 286 F.3d at 316-317. The District Court found that prisoners retain a constitutional right to intimate association that may be exercised through non-contact visitation. Because it found the existence of a fundamental right, the District Court proceeded to aptly the four- prong test of *Turner v Safley*, 482 U.S. 78 (1987) to determine whether Petitioners' visiting regulations impermissibly impinged upon the exercise of those constitutional rights. The District Court found that the regulations did not meet the *Turner* test and the Court of Appeals agreed.

The first of the three questions upon which this Court granted certiorari was: "Whether prisoners have a right to non-contact prison visitation protected by the First and Fourteenth Amendments." Ultimately, this Court chose not to define the extent of the asserted right, proceeding instead to apply the *Turner* test to the challenged regulations and to reach a different conclusion on whether restrictions violated Plaintiffs' constitutional rights than the lower court had. Specifically, this Court stated:

> We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to

> legitimate penological interests. This suffices to sustain the regulation in question.

(Slip op at pg 4)

The reversal of the Court of Appeals' judgment, without express limitation, could be used to argue that prisoners do not retain any right of intimate association. Although such an interpretation would contradict the text of this Court's own decision, modifying this Court's judgment to state that "the Court of Appeals judgment is reversed to "the Court of Appeals judgment is reversed to the extent it is not inconsistent with this ruling" would provide greater clarity on this important issue.

3. Visits of Minor Children With Their Parents

A third potential area of conflict that may arise in implementing this judgment involves the identity of the adults who can bring a minor child to visit a prisoner. The challenged rule states:

> [A] child who is under the age of 18 may visit a prisoner only if the child is on the prisoner's approved visitors list and is accompanied by an adult immediate family member or a legal guardian...

Pet. 175a, R 791.6609(5). Immediate family is elsewhere defined in the rules as the prisoner's parent, grandparent, sibling, spouse or child. R. 791.6609(9), Pet. 176a. The rule on who must accompany children is ambiguous since it does not specify whether the reference to "immediate family" is to the prisoner's immediate family, the child's immediate family, or both.

The question is one of great practical significance. A prisoner's sister, the child's aunt, would be immediate family to the prisoner but not to the child. Conversely, the child's biological father, if not married to the incarcerated mother, would be the child's immediate family but not the prisoner's.[1] The District Court struck down the rule based on the undisputed testimony of the drafter, who said the rule was intended to apply only to the prisoner's immediate family. 148 F. Supp. at 833, n. 30 (referencing testimony of Van Ochten at 6th Cir. JA 4135-4138). The Court of Appeals affirmed that holding, recognizing that the limited number of adults who could bring a child to visit its incarcerated parent under this scenario would constitute for many prisoners, "a ban on visits from their children". 286 F.3d at 320-321.

This Court upheld the rule on the assumption that a child authorized to visit may be accompanied by a broader universe of adults which included a legal guardian or "an adult who is an immediate family member of the child or of the inmate". (Slip op. at 2, emphasis added) While this Court referenced one facility's visitation operating procedure a supporting this assumption, operating procedures differ from facility to facility and do not definitively interpret the policy. Indeed, the operating procedures here illustrate the confusion created by the ambiguous rule. Some facilities limited the immediate family member

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[1] During oral argument before this Court, Petitioners' counsel confirmed that unless he was the child legal guardian, the child's biological father could *not* bring the child to visit its incarcerated mother. (Oral argument transcript, at 14-16.)

to that of a prisoner. *See e.g.*, OP-MRF-06.03.140 p. 2 *eff.* 3-1-99 ("A person under eighteen (18) may visit if" they are the child, stepchild or grandchild of the prisoner being visited and are in the company of a member *of the prisoner's immediate family* (parents, child, grandparent, stepparent ...). Others limited the immediate family member who could accompany the child to the child's immediate family member. *See e.g.*, OP-NCF-05.03.140 p. 3 *eff.* 11-3-99 ("[m]ust be accompanied by an adult immediate family member (of the child of the prisoner, but must be on the prisoner's approved list...")[2] *See also* OP-ICF-05.03.140A *eff.*, p. 2, 6-14-97. ("The mandatory escort of the prisoner's minor child, stepchild, grandchild or step-grandchild must be a parent/legal guardian or immediate family member of the minor child(ren)". *See also* 6th Cir. JA 4745, 4994, 5003.

The factual assumptions as to how the policy was interpreted and applied, on which this Court rested its decision, differ from the findings of the District Court, affirmed by the Court of Appeals. The Court of Appeals found that this rule, by requiring children to be accompanied by a legal guardian or immediate family member *of the prisoner*, unreasonably restricts visitation with the prisoner's own children. While this Court interpreted the rule more broadly, to include immediate family members of both the prisoner and the child, and thus found the restrictions not to be unreasonable, by reversing the Court of Appeals' decision *in toto*, it appears to nullify the lower court's determinations that a narrower restriction would be unreasonable. Should Petitioners

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[2] Still another operating procedure allowed minor child to visit only when accompanied by "a parent or legal guardian". OP-ECF-CPP-05.03.140 p. 3 *eff.* 7-1-99.

choose to apply the rule as originally envisioned by the drafter and understood by the lower courts, numerous children would be unable to visit their incarcerated parents.

Plaintiffs-Respondents petition this Court for rehearing on these issues to avoid confusion on remand in the implementation of this Court's judgment and proceedings related to the application of the Defendants' rules.

Plaintiffs-Respondents request that rehearing be granted or, alternatively, the judgment of this Court be modified to reflect that the lower court's rulings are reversed to the extent they are inconsistent with this Court's decision and this matter is remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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DATED: July 9, 2003

No 02-94

In the
Supreme Court of the United States
October Term, 2002

WILLIAM OVERTON, Director of
Michigan Department of Corrections;
MICHIGAN DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

MICHELLE BAZZETTA, et al.,

Respondents.

CERTIFICATE OF COUNSEL

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As counsel of record for Plaintiff-Appellants, I hereby certify that the Petition for Rehearing is presented in good faith and not for purposes of delay.

Respectfully submitted,

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DATED: July 9, 2003

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 25, 2003

Mr. Thomas L. Casey
Solicitor General
PO Box 30212
Lansing, M 48909

Re: William Overton, Director, Michigan Department of Corrections, et al
v. Michelle Bazzetta, et al.
No. 02-94

Dear Mr. Casey:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

William K. Suter, Clerk